Under Arrest: Immigrants' Rights and the Rule of Law

SHOBA SIVAPRASAD WADHIA*

I. INTRODUCTION 853
II. HISTORY AND TERMINOLOGY 854
III. IMMIGRATION ENFORCEMENT AFTER THE FALL OF COMPREHENSIVE IMMIGRATION REFORM 862
A. Legal Authority 873
B. Accountability and Oversight 878
IV. RECOMMENDATIONS FOR MOVING FORWARD 888
V. CONCLUSION 891

I. INTRODUCTION

First, I would like to thank *The University of Memphis Law Review* for inviting me to speak today. It is an honor to be a part of this symposium with such a distinguished panel. Ordinarily, I might open with a commentary on the human consequences of our broken immigration system—perhaps a story from my lawyering days in the courtroom about a male auto mechanic from Trinidad stuck in deportation because of poor behavior as a teenager, or a local press story featuring a middle-aged woman stuck outside the United States because legal quotas freeze the ability for a wife to be with her husband, or a young man picking apples inside the United States without documentation or a legal way to reside and work in the United States. Instead of going on with the ordinary

* Director, Penn State Center for Immigrants' Rights, Assistant Clinical Professor of Law, Penn State Dickinson School of Law; formerly Deputy Director for Legal Affairs at the National Immigration Forum; Adjunct Professor at Howard University School of Law, and American University, Washington College of Law. Excerpts of this article are drawn from a backgrounder by this author at http://www.immigrationforum.org. My gratitude goes to Steven Legomsky, Beth Werlin, Brittney Nystrom, Sin Yen Ling, and Michael Wishnie for their helpful feedback on an earlier draft.

HeinOnline -- 38 U. Mem. L. Rev. 853 2007-2008

obstacles faced by many immigrants, let me share a story about someone extraordinary—Michael Maggio. Michael was a zealous immigration lawyer, professor, lover, and friend. He was a mentor to hundreds, if not thousands, of people. He was once president of the District of Columbia Chapter of the American Immigration Lawyers Association, lectured frequently on ethics, was known as a consistent selector of fine wines, and stood forever as a model of legal excellence, passionate lawyering, and teaching. Michael passed away on February 10, 2008, at the age of sixty, after a ten-month battle with non-Hodgkin's lymphoma. I arrived hours ago from his Philadelphia funeral. To the extent that any of my words on "emerging issues in immigration law" is a forum for passionate learning and legal excellence, they are dedicated to Michael.

This discussion is broken down into four parts. First, I will review some basic historical points and terminology. Second, I will describe some of the government's immigration enforcement policies following the comprehensive immigration reform ("CIR") debate and the human consequences and concerns behind such policies. Third, I will describe the relevant legal authorities for arresting and detaining noncitizens. Finally, I will provide some recommendations for moving forward.[1]

II. HISTORY AND TERMINOLOGY

One might find a discussion about immigration jargon superficial, but this terminology is the fuel for immigration politics and the many related deportation schemes being offered from Congress and the Executive Branch in the aftermath of "comprehensive immigration reform."

Some are troubled by the word "alien," a term frequently used in the Immigration and Nationality Act (or the "Act" or

1. Equally interesting, but beyond the scope of my remarks, are the multiple legislative proposals to expand the statutory authority of government officials to deport and detain noncitizens. *See, e.g.*, Safe Roads Enhancement Act of 2008, S. 2722, 110th Cong. (2008); Scott Gardner Act, S. 850, H.R. 1355, 110th Cong. (2007); Passport and Visa Security Act of 2007, S. 276, 110th Cong. (2007); Charlie Norwood CLEAR Act of 2007, H.R. 3494, 110th Cong. (2007); Immigration Enforcement and Border Security Act of 2007, S. 1984, 110th Cong. (2007); Secure America with Verification Enforcement, H.R. 4088, S. 2366 (2007).

HeinOnline -- 38 U. Mem. L. Rev. 854 2007-2008

"INA" as it is commonly called by immigration lawyers and advocates) and the immigration debate. The INA defines "aliens" as "any person not a citizen or national of the United States."[2] The term "alien" or "aliens" appears everywhere in the immigration statutes and even extends to lawful permanent residents or "green card" holders. The term also appears in the laws and policies interpreting INA, such as the regulations, court decisions, and policy memoranda. The Merriam-Webster Dictionary defines "alien" as "belonging or relating to another person, place, or thing."[3] Likewise, the term "alien fugitive" is a label used by the government to define noncitizens with outstanding removal orders.[4] While the term "fugitive" is normally associated with a person who "flees" or "escapes," the government's use of "alien fugitive" has been overinclusive, extending to noncitizens who may have a record of complying with government restrictions and orders to appear for hearings, but either left the United States voluntarily or, as a practical matter, did not receive notice from the government about a scheduled court date. A more preferable term by this author is the term "noncitizen."

Another fairly charged term is "illegal" alien or "illegal" immigrant. The phrase appears in press stories, articles from scholars, "action alerts" from advocates, and vignettes from bloggers.[5] Steven Legomsky, eminent author and professor of immigration law, notes, "I have no objection to the term 'illegal immigration,' but calling a *person* illegal is not only dehumanizing but meaningless. We don't describe speeders as 'illegal drivers.'"[6] The term has become so popular that some organizations, such as

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2. Immigration and Nationality Act (INA) § 101(a)(3), 8 U.S.C. § 1101(a)(3) (2006).

3. MERRIAM-WEBSTER'S COLLEGIATE DICTIONARY 30 (11th ed. 2004).

4. *See, e.g.*, ICE Arrests 125 Fugitives and Immigration Violators in Midwest Operation: *46 of Those Arrested Have Criminal Convictions*, Apr. 28, 2006, http://www.ice.gov/pi/news/newsreleases/articles/060428dc_2.htm (emphasis in original).

5. *See, e.g.*, Darryl Fears, *Illegal Immigrants Targeted by States*, WASH. POST, June 25, 2007, at A01, *available at* http://www.washingtonpost.com/wp-dyn/content/article /2007/06/24/AR2007062401662.html.

6. E-mail from Steven Legomsky to the author, March 12, 2008.

HeinOnline -- 38 U. Mem. L. Rev. 855 2007-2008

"Mothers Against Illegal Aliens," have adopted it as a brand name.[7] Lawrence Downes of the *New York Times* observes:

> America has a big problem with illegal immigration, but a big part of it stems from the word "illegal." It pollutes the debate. It blocks solutions. Used dispassionately and technically, there is nothing wrong with it. Used as an irreducible modifier for a large and largely decent group of people, it is badly damaging. And as a code word for racial and ethnic hatred, it is detestable. Since the word modifies not the crime but the whole person, it goes too far. It spreads, like a stain that cannot wash out. It leaves its target diminished as a human, a lifetime member of a presumptive criminal class.[8]

Generally, a noncitizen who seeks entry into the United States must fit within a category that defines him as an "immigrant" or "nonimmigrant." The terms "nonimmigrant" and "immigrant" are legal terms of art. The former generally applies to noncitizens coming to the United States for temporary reasons relating to business, pleasure, work, and school, among other reasons. The latter generally applies to noncitizens entering the United States on a more permanent basis such as those seeking "lawful permanent residence" based on a qualified relationship to a family member or employer. Notably, it can be argued that "immigrant" applies to the sect of noncitizens without authorization to be in the United States, such as those without "papers" or those with expired visas. After fitting into a statutory grouping, he must also show that he is not undesirable. The menu of "undesirables" can be found in a section of the immigration statute called "General classes of aliens ineligible to receive visas and ineligible for admission . . . ."[9] Legally speaking, the list of exclusion grounds can attach not only to

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7. *See* Mothers Against Illegal Aliens Home Page, http://mothersagainstillegalaliens.org (last visited Apr. 4, 2008).

8. Lawrence Downes, *What Part of 'Illegal' Don't You Understand?*, N.Y. TIMES, Oct. 28, 2007, *available at* http://www.nytimes.com/2007/10/28/opinion/28sun4.html.

9. INA § 212(a), 8 U.S.C. § 1182(a) (2006). Before 1996, "inadmissible" noncitizens were formally called "excludable aliens."

HeinOnline -- 38 U. Mem. L. Rev. 856 2007-2008

people outside the United States but also to certain individuals inside the United States, such as those applying for a green card or certain people who enter the country without inspection. Once a noncitizen is "admitted" into the United States, she can still be expelled from the United States based on adverse qualities listed in the immigration statute under the heading "Deportable aliens."[10] Whether a noncitizen is categorized by the government as "inadmissible" or "deportable," she generally has the right to go to "trial" before an immigration judge in a forum called a "removal" proceeding.[11] Many individuals, however, do not have the right to formal removal proceeding because they are subject to a process called "expedited removal."[12] Depending on the circumstance, a noncitizen can be "held" or "detained" by the immigration agency before, during, or after this trial.[13]

The notion of expulsion has been featured in United States immigration law for more than one hundred years.[14] The Act of 1875 served as the first federal exclusion law and prohibited noncitizens convicted of certain crimes or engaged in prostitution from entering the United States.[15] In 1882, Congress expanded the list of excludable classes to include "lunatics," "idiots," and "anyone unable to take care of herself . . . without becoming a public charge."[16] The Chinese Exclusion Act of 1882 barred Chinese nationals from entering or remaining in the United States.[17] In 1885, Congress passed a law prohibiting contract foreign labor.[18] The list of excludable noncitizens swelled again in 1891, with the

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10. INA § 237(a), 8 U.S.C. § 1227 (2006).

11. INA § 240, 8 U.S.C. § 1229(a) (2006).

12. INA § 235, 8 U.S.C. § 1225 (2006).

13. *See, e.g.*, INA § 235(b), 8 U.S.C. § 1225; INA § 236(a), 8 U.S.C. § 1226 (2006); INA § 236(c), 8 U.S.C. § 1226 (2006); INA § 236A, 8 U.S.C. § 1226a (2006).

14. For an excellent synopsis of the legal exclusion grounds, see Chapter 5 of STEPHEN H. LEGOMSKY, IMMIGRATION AND REFUGEE LAW AND POLICY (4th ed. 2004).

15. An Act Supplementary to the Acts in Relation to Immigration, ch. 141, 18 Stat. 477 (Mar. 3, 1875).

16. Immigration Act of 1882, ch. 376, 22 Stat. 214 (Aug. 3, 1882).

17. Chinese Exclusion Act of 1882, ch. 126, 22 Stat. 58 (May 6, 1882).

18. An Act to Prohibit the Importation and Migration of Foreigners and Aliens under Contract or Agreement to Perform Labor in the United States, its Territories, and the District of Columbia, ch. 164, 23 Stat. 332 (Feb. 26, 1885).

HeinOnline -- 38 U. Mem. L. Rev. 857 2007-2008

addition of "insane" persons, "polygamists" and "persons suffering from a loathsome or a dangerous contagious disease."[19] The 1891 Act also created criminal exclusion grounds for noncitizens convicted of a felony or infraction involving "moral turpitude."[20]

The use of exclusion laws to keep out specific human qualities continued in the twentieth century. The 1903 Act provided for the exclusion of "anarchists, or persons who believe in or advocate for the overthrow by force or violence of the Government."[21] The 1903 Act also fashioned exclusion grounds for "epileptics" and those who had been insane within the past five years.[22] The Immigration Act of 1917 added "persons of constitutional psychopathic inferiority, persons of chronic alcoholism, and persons inflicted with tuberculosis 'in any form'" to the list of those excludable.[23] Congress also enacted a "literacy" test, barring entry to noncitizens who could not read or write.[24]

Congress enacted the current Immigration and Nationality Act (also known as the McCarran-Walter Act) in 1952, and has amended it many times since then.[25] The Act has been compared second to the tax code in complication.[26] The current statute makes a distinction between noncitizens who have been "admitted" into the United States and those who are arriving at the border or who entered the United States without being admitted or paroled (i.e., those without "papers"). For example, noncitizens who have not yet been admitted are subject to a series of "inadmissibility" grounds while those who have been admitted are subject to "deportability" grounds.[27] Generally, these grounds relate to five categories: health and morals, economics, crimes, terrorism and

19. Immigration Act of 1891, ch. 551, 26 Stat. 1084 (Mar. 3, 1891).

20. *Id.*

21. Immigration Act of 1903, ch. 1012, 32 Stat. 1213, 1214 (Mar. 3, 1903).

22. *Id.*

23. Immigration Act of 1917, ch. 29, 39 Stat. 874 (Feb. 5, 1917).

24. *Id.*

25. Immigration and Nationality Act of 1952, Pub. L. No. 82-414, 66 Stat. 163 (June 27, 1952) (codified in 8 U.S.C. §§ 1101 et seq.).

26. *See, e.g.*, Eduardo Aguirre, Director, U.S. Citizenship and Immigration Services, Testimony before the House Appropriations Subcommittee on Homeland Security, 109th Cong. (March 2006).

27. *See* INA § 212(a), 8 U.S.C. § 1182 (2006); INA § 237(a), 8 U.S.C. § 1227 (2006).

HeinOnline -- 38 U. Mem. L. Rev. 858 2007-2008

national security, and control and paperwork.[28] Over the years, the government not only increased these grounds but also tightened restrictions on a noncitizen's access to the courts, release from detention, and eligibility for relief from removal. Note in particular: Congress's passage of the Illegal Immigration Reform and Immigrant Responsibility Act of 1996 ("IIRIRA");[29] the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA");[30] the Executive Branch actions issued in reaction to September 11, 2001; and Congress's passage of the REAL ID Act of 2005 ("REAL ID Act").[31]

For example, the 1996 immigration laws created a new definition for the term "aggravated felony" which has been interpreted to include activities that are neither a felony nor violent.[32] The term extends to lawful permanent residents and also applies retroactively.[33] Most individuals labeled as "aggravated felons" are barred from almost all defenses to deportation, including asking a judge for a pardon or waiver of removal based on outstanding equities and contributions such as family or business ties in the United States.[34] Likewise, they are subject to mandatory detention without bond.[35]

Among the dozens of regulatory actions and policies issued by the Department of Justice following the aftermath of September 11, 2001 was the "special registration" program of the National

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28. *See* INA § 212(a), 8 U.S.C. § 1182; INA § 237(a), 8 U.S.C. § 1227.

29. Illegal Immigration Reform and Immigrant Responsibility Act (IIRIRA) of 1996, Pub. L. No. 104-208, 110 Stat. 3009 (Sept. 30, 1996).

30. Antiterrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (Apr. 24, 1996).

31. These laws have been analyzed extensively by the author in previous law reviews. *See generally* Shoba Sivaprasad Wadhia, *The Policy and Politics of Immigrant Rights*, 16 TEMP. POL. & CIV. RTS. L. REV. 387 (2007); Shoba Sivaprasad Wadhia, *Broken Fences: Legal and Practical Realities of Immigration Reform in the Post-9/11 Age: Immigration: Mind Over Matter*, 5 U. MD. L.J. RACE, RELIGION, GENDER & CLASS 201 (2005).

32. *See* INA § 237(a)(2)(A)(iii), 8 U.S.C. § 1227(a)(2)(A)(iii) (2006); Wadhia, *Policy and Politics*, *supra* note 31, at 396; Wadhia, *Broken Fences*, *supra* note 31, at 220–21.

33. *See* INA § 101(a)(43); 8 U.S.C. § 1101(a)(43) (2006).

34. Wadhia, *Policy and Politics*, *supra* note 31, at 396; Wadhia, *Broken Fences*, *supra* note 31, at 221.

35. *See* INA § 236(c), 8 U.S.C. § 1226 (2006).

HeinOnline -- 38 U. Mem. L. Rev. 859 2007-2008

Security Entry-Exit Registration ("NSEERS"). The domestic NSEERS program solicited more than 80,000 young men and boys from predominantly Muslim countries to local immigration offices for interrogations, fingerprints and photographs.[36] Nearly 14,000 of these individuals were placed in removal proceedings.[37] Arguably, the NSEERS program was a discriminatory tracking scheme designed to arrest, detain and potentially deport noncitizen males who chose to come forward and register, among other changes. Many elements of NSEERS remain on the books, as does the agency's authority to reenact a national-origin driven tracking scheme in the future.[38]

Similarly, the REAL ID Act was a bill tacked onto an emergency supplemental bill that, among other things, modified the rules of asylum by raising the burden of proof an applicant must show to prove she fits into the statutory definition of "refugee."[39] The bill also made significant changes to federal court review of immigration matters.[40]

It is worth noting that the immigration agency underwent a significant makeover following the attacks of September 11, 2001. Pursuant to the Homeland Security Act of 2002, the Immigration and Naturalization Service was abolished by statute and many immigration functions were reorganized within a new cabinet-level department—the Department of Homeland Security (the "Department" or "DHS").[41] In all, twenty-two federal agencies were merged into the new Department. The Homeland Security Act created a branch called the "Bureau of Border Security" to perform immigration "enforcement" functions. It also established a "Bu-

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36. *See* Changes to National Security Entry/Exit Registration System (NSEERS), Dec. 1, 2003, *available at* http://www.ice.gov/pi/news/factsheets/nseersFS120103.htm.

37. *Id.*

38. *See* Suspending the 30-Day and Annual Interview Requirements From the Special Registration Process for Certain Nonimmigrants, 68 Fed. Reg. 67, 578 (Dec. 2, 2003).

39. Emergency Supplemental Appropriations Act for Defense, the Global War on Terror, and Tsunami Relief of 2005 (REAL ID Act), Pub. L. No. 109–13, 119 Stat. 231 (May 11, 2005).

40. *Id.*

41. Homeland Security Act of 2002, Pub. L. No. 107–296, 116 Stat. 2135 (Nov. 25, 2002).

HeinOnline -- 38 U. Mem. L. Rev. 860 2007-2008

reau for Citizenship and Immigration Services" to process affirmative immigration matters such as applications for lawful permanent residence, asylum, and citizenship.[42] In January 2003, President George Bush used his statutory authority to reorganize the "Bureau of Border Security" by renaming it "Immigration Customs Enforcement" and by combining various border related functions (among them, the Agricultural Quarantine Inspection program, INS inspection services, Border Patrol and the Customs Service) into a new "Customs and Border Protection."[43]

The Executive Office for Immigration Review, however, continues to be retained in the Department of Justice ("DOJ") and is responsible for "conducting immigration court proceedings, appellate reviews, and administrative hearings."[44] Notably, the DOJ adopted regulations that duplicated and created a new chapter of regulations that purportedly falls within the jurisdiction of the Executive Office for Immigration Review.[45] The practical effect is that DHS and DOJ maintain concurrent jurisdiction over a number of immigration matters among them asylum and detention.

Select visa matters and refugee acceptance functions are performed by the Department of State.[46] Functions related to the care and detention of unaccompanied minor noncitizens are housed by the Department of Health and Human Services. Within the Office of the Secretary is an Citizenship and Immigration Services Ombudsman, Office for Civil Rights and Civil Liberties and the

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42. *See* United States Citizenship and Immigration Services, http://www.uscis.gov/portal/site/uscis (last visited Apr. 4, 2008).

43. Border Reorganization Fact Sheet, http://www.dhs.gov/xnews/releases/press_release_0073.shtm (last visited Apr. 4, 2008).

44. *See* United States Department of Justice Executive Office for Immigration Review, http://www.usdoj.gov/eoir/responsibilities.htm (last visited Apr. 4, 2008).

45. *See* Reorganization of Regulations, 68 Fed. Reg. 9,824–46 (Feb. 23, 2003); Reorganization of Regulations, 68 Fed. Reg. 10,349–61 (Mar. 5, 2003); News Release, Reorganization of Title 8 Regulations Due to Transfer of Functions, Mar. 18, 2003, *available at* http://www.usdoj.gov/eoir/press/03/title8regs.htm.

46. *See, e.g.*, United States Department of State, Bureau of Consular Affairs, http://travel.state.gov/visa/visa_1750.html (last visited Apr. 4, 2008).

HeinOnline -- 38 U. Mem. L. Rev. 861 2007-2008

Office, and Office for the Inspector General, which to varying degrees play oversight and accountability roles for the Department.[47]

III. IMMIGRATION ENFORCEMENT AFTER THE FALL OF COMPREHENSIVE IMMIGRATION REFORM

Beginning in July of 2005, comprehensive immigration reform consumed Capital Hill and Washington as members of Congress, the Administration, and key stakeholders considered modernizing the U.S. immigration system to reflect the laws of supply and demand, principles of family unity, and enforceability of rules. "Comprehensive Immigration Reform" was a political term of art used to describe a program that revamps the U.S. family and employment immigration system to provide legal status and potential permanent residence to qualified immigrants and their families. In addition, comprehensive immigration reform also focused on enforcement policies for the U.S. employers and immigrants who were abusing the newly-created immigration system.

Many legislative proposals for broad immigration reforms were introduced between 2005 and 2007. During the 109th Congress, the bipartisan "Secure America and Orderly Immigration Act" was introduced in the House and Senate.[48] In March 2006, the Senate Judiciary Committee began debate on a bill authored by Committee Chairman Arlen Specter (R-PA). The bill was debated for several weeks in the Judiciary Committee and on the Senate floor.[49] The bill passed with significant changes on May 25, 2006.[50] During the 110th Congress, the democratic "Security Through Regularized Immigration and a Vibrant Economy Act" was introduced by Representatives Luis Gutierrez (D-IL), Jeff

47. *See* Citizenship and Immigration Services Ombudsman, http://www.dhs.gov/xabout/structure/editorial_0482.shtm (last visited Apr. 4, 2008); Office for Civil Rights and Civil Liberties, http://www.dhs.gov/xabout/structure/editorial_0371.shtm (last visited Apr. 4, 2008); Office of Inspector General, http://www.dhs.gov/xoig/ (last visited Apr. 4, 2008); Office of the Secretary, http://www.dhs.gov/xabout/structure/#2 (last visited Apr. 4, 2008).

48. Secure America and Orderly Immigration Act, H.R. 2330, 109th Cong. (2005).

49. Comprehensive Immigration Reform Act of 2006, S. 2611, 109th Cong. (2006).

50. *Id.*

HeinOnline -- 38 U. Mem. L. Rev. 862 2007-2008

Flake (R-AZ), and twenty-eight other original co-sponsors.[51] More recently, the White House and a handful of Senators produced the Secure Borders, Economic Opportunity, and Immigration Reform Act.[52] This bill was defeated on a crucial procedural vote on June 28, 2007.[53] Transcended by politics, the immigration debate ended without a solution or soul.

Following this debate, the government continued its course of using dated laws—or creating new ones—to penalize noncitizens, their families, and people who look like them. The Department's execution of enforcement is best illustrated through its "worksite enforcement" and "fugitive operation" programs. ICE agents and partnering agencies have arrested many thousands of noncitizens in factories, meatpacking plants, and other workplaces. Several of these arrests have been framed as an investigation into "identity theft."[54] In December 2006, ICE raided six meat processing plants owned by Swift & Company and interrogated U.S. citizen employees alongside their noncitizen coworkers.[55] According to the *New York Times*, "[n]early 1,300 people—almost 10 percent of Swift's work force—were taken away in what the government said was the largest but not the last assault on the underground immigrant economy."[56] In January 2007, ICE arrested ten workers at the "Pegasus Restaurant" in Chicago's Greektown neighbor-

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51. Security Through Regularized Immigration and a Vibrant Economy Act (STRIVE) of 2007, H.R. 1645, 110th Cong. (2007).

52. Secure Borders, Economic Opportunity and Immigration Reform Act of 2007, S. 1639, 110th Cong. (2007).

53. U.S. Senate Roll Call Votes 110th Congress – 1st Session, *available at* http://www.senate.gov/legislative/LIS/roll_call_lists/roll_call_vote_cfm.cfm?congress=110&session=1&vote=00235 (last visited Apr. 4, 2008).

54. Eunice Moscoso, *Chertoff Defends Immigration Raids, Detentions*, PALM BEACH POST, Apr. 6, 2008, *available at* http://www.palmbeachpost.com/search/content/shared/news/immigration/IMMIG_CHERTOFF06_COX.html.

55. *See, e.g.*, Litigation Clearinghouse: Litigation Relating to ICE Raids at Swift Meat Packing Plants, http://www.ailf.org/lac/clearinghouse_122106_ICE.shtml (last visited Apr. 4, 2008).

56. Editorial, *Swift Raids*, N.Y. TIMES, Dec. 18, 2006, *available at* http://www.nytimes.com/2006/12/18/opinion/18mon1.html?_r=1&pagewanted=print&oref=slogin.

HeinOnline -- 38 U. Mem. L. Rev. 863 2007-2008

hood.[57] In March 2007, immigration agents raided the New Bedford business of Michael Bianco, Inc., arresting hundreds of immigrant workers working on a Defense Department subcontract.[58] The New Bedford raids resulted in more than 350 arrests and was followed by multiple press stories, speeches by local and state government officials, and, more recently, an investigation by the Department of Homeland Security's Inspector General.[59] In May 2007, ICE, in cooperation with the Social Security Administration's Office for the Inspector General, Missouri Highway Patrol, U.S. Marshals Service's Fugitive Task Force and the U.S. Department of Agriculture, arrested 136 workers at the George's Processing poultry-processing plant located in Butterfield, Missouri.[60] In August 2007, more than 160 immigrants were arrested following a raid of a food plant in Cincinnati, Ohio.[61] In February 2008, ICE

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57. News Release, U.S. Immigration and Customs Enforcement, ICE Arrests 10 Illegal Aliens Working at Chicago Restaurant, Jan. 10, 2007, *available at* http://www.ice.gov/pi/news/newsreleases/articles/070110chicago.htm.

58. New Bedford Manufacturer and Managers Arrested on Charges of Conspiring: *ICE to Process Hundreds for Removal*, Mar. 6, 2007, http://www.ice.gov/pi/news/newsreleases/articles/070306boston.htm (emphasis in original).

59. *See, e.g.*, Yvonne Abraham, *Up to 350 in Custody after New Bedford Immigration Raid*, BOSTON GLOBE, Mar. 6, 2007, *available at* http://www.boston.com/news/globe/city_region/breaking_news/2007/03/up_to_350_in_cu.html; John C. Drake, *U.S. Agency is Probing Raid on Factory*, BOSTON GLOBE, Jan. 19, 2008, *available at* http://www.boston.com/news/local/articles/2008/01/19/us_agency_is_probing_raid_on_factory/; Op-Ed, Carol Rose & Christoper Ott, *Inhumane Raid Was Just One of Many*, BOSTON GLOBE, Mar. 26, 2007 *available at* http://www.boston.com/news/globe/editorial_opinion/oped/articles/2007/03/26/inhumane_raid_was_just_one_of_many/; MIRA Coalition: New Bedford Immigration Raids, http://www.miracoalition.org/home/new-bedford-immigration-raids (last visited Apr. 4, 2008).

60. News Release, U.S. Immigration and Customs Enforcement, 136 Workers Apprehended after Worksite Enforcement at George's Processing Poultry-processing Plant as Part of an Ongoing Criminal Investigation, May 23, 2007, *available at* http://www.ice.gov/pi/news/newsreleases/articles/070523springfield.htm.

61. News Release, U.S. Immigration and Customs Enforcement, ICE Executes Federal Criminal Search Warrants at Koch Foods and Arrests More than 160 on Immigration Charges: Simultaneous Criminal Search Warrants

HeinOnline -- 38 U. Mem. L. Rev. 864 2007-2008

raided a producer of printer supplies, arresting 130 workers on administrative immigration violations.[62] In April 2008, ICE raided a luxury resort in Leesburg, Virginia, at which fifty-nine immigrants were arrested.[63] According to ICE Special Agent In Charge Mark X. McGraw, "Today's enforcement action is part of ICE's nationwide aggressive pursuit of unauthorized workers and employers who violate the law . . . Companies that use cheap, illegal alien labor as a business model should be on notice that ICE is dramatically enhancing its enforcement efforts against illegal employment schemes."[64] Also in April 2008, ICE arrested and detained more than 300 workers associated with Pilgram's Pride Company, one of the United State's largest poultry-processing plants.[65] According to ICE's related press release, only a fraction of these workers were charged with criminal violations.[66]

Executed at Koch Corporate Office in Chicago, IL, Aug. 28, 2007, *available at* http://www.ice.gov/pi/news/newsreleases/articles/070828cincinnati.htm.

62. News Release, U.S. Immigration and Customs Enforcement, ICE Executes Federal Search Warrant at Van Nuys, Calif., Manufacturing Plant in Ongoing Probe: 8 Illegal Alien Workers Charged Criminally; 130 Others Arrested on Immigration Violations, Feb. 8, 2008, *available at* http://www.ice.gov/pi/news/newsreleases/articles /080208losangeles.htm.

63. News Release, U.S. Immigration and Customs Enforcement, ICE Nabs Illegal Workers at an Affluent Hotel Resort in Northern Virginia: *59 Arrests Made in Leesburg, Virginia*, Apr. 8, 2008, *available at* http://www.ice.gov/pi/news/newsreleases/articles/080408washington.htm (emphasis in original); *see also* Jonathan Mummalo, *59 Workers at Loudoun Resort Face Deportation*, WASH. POST, Apr. 13, 2008, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2008/04/12/AR2008041201222.html.

64. News Release, U.S. Immigration and Customs Enforcement, *supra* note 65.

65. Dianne Solís & Alejandro Martínez, *Immigration Agents Arrest Nearly 300 at Pilgrim's Pride Plants*, DALLAS MORNING NEWS, Apr. 16, 2008, *available at* http://www.dallasnews.com/sharedcontent/dws/dn/latestnews/stories/041708dnmetice.6c9184cf.html; News Release, U.S. Immigration and Customs Enforcement, 91 Pilgrim's Pride Workers Face Criminal Charges in Ongoing Identity Theft Probe, Apr. 17, 2008, *available at* http://www.ice.gov/pi/news/newsreleases/articles/080417dallas.htm; Anabelle Garay, Immigration Agents Raid Pilgrim's Pride Plants, *available at* http://media.www.dailylobo.com/media/storage/paper344/news/2008/04/17/News/Ap.Immigration.Agents.Raid.Chicken.Plants-3331724.shtml.

66. *See* News Release, *supra* note 67.

The worksite enforcement activities by ICE are well-publicized and featured regularly on the ICE website.[67] According to a senior ICE official, ICE experienced a sixfold increase in new officers dedicated to worksite enforcement raids from fiscal year 2003 through fiscal year 2007.[68] Secretary Chertoff, highlighting immigration accomplishments by DHS for 2007 in an appearance before the House Judiciary Committee, remarked "Fiscal Year 2007 represented a banner year for ICE's worksite enforcement efforts. ICE made 4,077 administrative arrests and 863 criminal arrests in targeted worksite enforcement operations across the country."[69]

Beyond the workplace, several ICE-directed raids have occurred under the "National Fugitive Operations Program" ("NFOP"). The NFOP was established in 2002 with a mission "to eliminate the backlog of fugitives and ensure that the number of aliens deported equals the number of final orders of removal issued by the immigration courts in any given year."[70] This backlog includes countless noncitizens that may have never received a notice to appear in court at a scheduled time, through no fault of their own and, as such, received a final order of removal without knowledge or notice.[71] Some noncitizens were ordered removed as small

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67. *See generally* U.S. Immigration and Customs Enforcement Home Page, http://www.ice.gov/ (last visited Apr. 4, 2008).

68. U.S. GOVERNMENT ACCOUNTABILITY OFFICE, IMMIGRATION ENFORCEMENT: ICE COULD IMPROVE CONTROLS TO HELP GUIDE ALIEN REMOVAL DECISION MAKING, Oct. 2007, *available at* http://www.gao.gov/new.items/d0867.pdf.

69. Michael Chertoff, Secretary, United States Department of Homeland Security, Appearance before the United States House of Representatives Committee on the Judiciary, Mar. 5, 2008, *available at* http://judiciary.house.gov/media/pdfs/ Chertoff080305.pdf.

70. Public Information: National Fugitive Operations Program, http://www.ice.gov/pi/dro/nfop.htm (last visited Apr. 4, 2008).

71. INA Section 240(b)(5)(A) provides:

> Any alien who, after written notice required under paragraph (1) or (2) of section 239(a) of this title has been provided to the alien or the alien's counsel of record, does not attend a proceeding under this section, shall be ordered removed in absentia if the Service establishes by clear, unequivocal, and convincing evidence that the written notice was so provided and that the alien is removable (as defined in subsection

HeinOnline -- 38 U. Mem. L. Rev. 866 2007-2008

children and did not understand the import of the proceedings. The DHS Office of the Inspector General identifies three groups of individuals falling under the "fugitive alien" category: (1) those who did not appear for deportation as ordered by the Executive Office for Immigration Review immigration judge's final order of removal; (2) those who voluntarily left the United States without ICE's knowledge; or (3) instances where ICE is unaware that the particular individual changed her immigration status or died.[72]

Fugitive Operation Teams are dispersed across the country to apprehend, detain, and remove noncitizens with outstanding removal orders. The "Fugitive Operation Team" is composed of seven deportation officers: one "supervisory deportation officer," one "deportation assistant" (responsible for administrative tasks), four "deportation officers" (responsible for identifying, locating, and apprehending "fugitive aliens"), and one "immigration enforcement agent" (responsible for helping with such apprehensions and also for transporting the "fugitive" from the arrest location to a local immigration detention facility or processing center).[73]

In fiscal year 2007, more than 30,000 immigrants were arrested under the NFOP.[74] Last March, DHS Secretary Michael Chertoff testified that:

> In Fiscal Year 2007, ICE Fugitive Operations Teams arrested 30,407 individuals, nearly double the number of arrests in Fiscal Year 2006. The teams, which quintupled in number from 15 to 75

(e)(2)). The written notice by the Attorney General shall be considered sufficient.

INA § 240(b)(5)(A), 8 U.S.C. § 1229a(b)(5)(A) (2006). While the law permits a noncitizen to reopen his case if, for example, the government did not provide proper "notice," there remains a practical concern that noncitizens without counsel are aware of this rule or that such a distinction is made when ICE categorizes individuals as "alien fugitives" initially.

72. Department of Homeland Security, Office of Inspector General, An Assessment of United States Immigration and Customs Enforcement's Fugitive Operations Teams 3, March 2007, *available at* http://www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-34_Mar07.pdf.

73. *Id.* at 6.

74. Remarks by Homeland Security Secretary Michael Chertoff on 2007 Achievements and 2008 Priorities, Dec. 12, 2007, *available at* http://www.dhs.gov/xnews/speeches/sp_1197513975365.shtm.

HeinOnline -- 38 U. Mem. L. Rev. 867 2007-2008

> between 2005 and 2007, identify, locate, arrest and remove aliens who have failed to depart the United States pursuant to a final order of removal, deportation, or exclusion; or who have failed to report to a Detention and Removal Officer after receiving notice to do so.[75]

In some cases, state- or city-specific "teams" commemorate the number of arrests made. For example, ICE featured the more than 900 arrests made by two fugitive operations teams in Philadelphia during 2007.[76] In this feature, ICE also noted that "[o]f those arrested, 160 had criminal records in addition to being in this country illegally. The 2007 arrests represent a ninety percent increase over the number of arrests in fiscal 2006."[77] Assuming arguendo that the 160 individuals with criminal records had actual convictions, this still leaves more than 700 noncitizen arrests unrelated to criminal activity that arguably include well-intentioned noncitizens who are working and living in the United States. Citing to statistics publicized by ICE, a recent lawsuit complaint concludes that under a Fugitive Operation Program known as "Operation Return to Sender" as little as one in three were persons arrested in New Jersey under this Operation were actually a "fugitive" as defined by ICE.[78] Moreover, DHS appears motivated to

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75. Michael Chertoff, Secretary, United States Department of Homeland Security, Appearance before the United States House of Representatives Committee on the Judiciary 12, Mar. 5, 2008, *available at* http://judiciary.house.gov/media/pdfs/Chertoff080305.pdf.

76. News Release, U.S. Immigration and Customs Enforcement, ICE Fugitive Operations Teams in Philadelphia Arrest over 900 Last Year: *Arrests Are Part of National Enforcement Effort to Make the Nation's Streets Safer*, Dec. 4, 2007, *available at* http://www.ice.gov/pi/news/newsreleases/articles/071204philadelphia.htm (emphasis in original).

77. *Id.*

78. *See* Complaint at 14, Argueta v. Myers, No. 08-1652 (D.N.J. Apr. 3, 2008) (citing to ICE Press Release issued in Newark on May 1, 2007 ("only 75 'fugitives' among 217 arrests from April 9–27, 2007"); April 2, 2007 ("only 55 'fugitives' among 128 arrests from March 19–30, 2007"); March 1, 2007 ("only 89 'fugitives' among 220 arrests in January 2007"); and November 20, 2006 ("only 53 'fugitives' among 137 arrests from November 13–20, 2006")); *see generally* Immigration Home Raids in New Jersey, http://law.shu.edu/csj/iceraids.html (last visited Apr. 4, 2008).

HeinOnline -- 38 U. Mem. L. Rev. 868 2007-2008

continue the fugitive operations program in 2008. DHS Secretary Chertoff testified, "In Fiscal Year 2008, Congress authorized an additional 29 teams. Fugitive Operations Teams have arrested more than 10,000 individuals this year."[79] For example, in February 2008, 225 arrests were made in Ohio, Michigan, Illinois, New York, Wisconsin, and Missouri, through eleven fugitive operation teams.[80] Similarly, in April 2008, ICE advertised their success in arresting more than 330 "fugitives" during a two-week operation in Florida's Miami, Broward and Palm Beach counties.[81]

The government's ability to label any immigrant with a removal order as a "fugitive" and prioritize their removal through raids without rights is deeply concerning. Many home-based arrests by ICE have been "collateral," meaning that authorities entered a home searching for X, and, without cause, arrested Y. Consider the example of a man from Kansas who came home from work, parked his car on the street, and headed up to his house.[82] Officers were on the porch of the house next door.[83] The officers approached him, asked him questions, and used inappropriate physical force.[84] They were looking for the person next door, but the police and ICE took the neighbor instead.[85] Recognizing the government's use of collateral arrests, the Government Accountability Office reports that:

> [I]n looking for a criminal alien who is the target of an investigation, a fugitive operations team may encounter a friend or relative of the targeted alien—who is also removable—but not the primary target of an ICE investigation. If the friend or relative has

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79. Chertoff, *supra* note 71, at 8.

80. News Release, Local ICE Fugitive Operations Team Arrests 225 in 4-day Great Lakes Operation, Feb. 26, 2008, *available at* http://www.ice.gov/pi/news/newsreleases/articles/080226detroit.htm.

81. News Release, Two-Week ICE DRO Operation Targeting Fugitives Yields More [Than] 330 Arrests in Miami, Broward and Palm Beach Counties, Apr. 7, 2008, *available at* http://www.ice.gov/pi/news/newsreleases/articles/080407miami.htm.

82. Example available and on file with author.

83. Example available and on file with author.

84. Example available and on file with author.

85. Example available and on file with author.

HeinOnline -- 38 U. Mem. L. Rev. 869 2007-2008

> a humanitarian circumstance, like being the primary caregiver for small children, the officers can decide to not apprehend the friend or relative and opt for processing at a later time after reviewing the circumstances of the case and determining that no other child care option is available at the time. In such instances, ICE headquarters officials told us that officers are to confirm child welfare claims made by an alien and determine whether other child care arrangements can be made.[86]

Reports from non-governmental organizations ("NGOs") and the press, decisions from judges, and remarks from select government officials indicate that immigration officers and partnership agents have arrested and detained many immigrants without basic due process.[87] Evidence further suggests that many were degraded in front of their spouses and children.[88] For example, a report by National Council of La Raza and the Urban Institute indicates that, on average, the number of children impacted by worksite raids is about one-half the number of adults.[89] The La Raza report highlights:

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86. IMMIGRATION ENFORCEMENT, *supra* note 70, at 13.

87. *See, e.g.*, NAT'L COUNCIL OF LA RAZA, PAYING THE PRICE: THE IMPACT OF IMMIGRATION RAIDS ON AMERICA'S CHILDREN, Oct. 31, 2007, *available at* http://www.nclr.org/files/49166_file_PayingthePrice_errata_FNL.pdf; NAT'L NETWORK FOR IMMIGRANT AND REFUGEE RIGHTS, OVER-RAIDED, UNDER SIEGE: U.S. IMMIGRATION LAWS AND ENFORCEMENT DESTROY THE RIGHTS OF IMMIGRANTS, Jan. 2008, *available at* http://www.nnirr.org/resources/docs/executivesummary3_.pdf; News Release, Kerry Demands Report on Immigration Raid Procedures, Mar. 6, 2008, *available at* http://kerry.senate.gov/cfm/record.cfm?id=294324; Eunice Moscoso, *House Panel Questions U.S. Immigration Raids*, AUSTIN AMERICAN-STATESMAN, Feb. 16, 2008, *available at* http://www.tindallfoster.com/immigrationresources/immigrationinthenews/HousePanelQuestionsUSImmigrationRaids.pdf; Anna Gorman, *L.A. Mayor Chides ICE for workplace Immigration Raids*, L.A. TIMES, Apr. 10, 2008, *available at* http://www.latimes.com/news /local/la-me-raids10apr10,1, 298889.story; Maria Sacchetti, *Commission Hears Testimony on U.S. Immigration Raids*, BOSTON GLOBE, Apr. 8, 2008, *available at* http://www.boston.com/news/local/articles/2008/04/08/commission_hears_testimony_on_us_immigration_raids/.

88. NAT'L COUNCIL OF LA RAZA, *supra* note 89.

89. NAT'L COUNCIL OF LA RAZA, *supra* note 89, at 15.

HeinOnline -- 38 U. Mem. L. Rev. 870 2007-2008

> Some single parents and other primary caregivers were released late on the same day as the raids, but others were held overnight or for several days. Many of the arrested parents were afraid to divulge that they had children because they believed that ICE would take their children into custody as well.[90]

Similarly, in November, Sayda Umanzor, a twenty-seven-year-old mother of three, including a newborn baby, was held in her Ohio home by four male agents who initially came searching for the mother's relative.[91] During the course of this raid, one of the ICE officers pointed to the woman's two children and exclaimed, "Do you think these children will keep you in the US? You are wrong."[92] Soon after, County social services arrived.[93] Subsequently, this mother was arrested, handcuffed, waist-banded, and detained in an ICE-contracted detention facility.[94] This twenty-seven-year-old nursing mother of three remained separated from her children for several days.[95] Arguably, it took an investigation conducted by *New York Times* reporter Julia Preston and the subsequent intervention of ICE Assistant Secretary Julie Myers before this mother was released on an electronic ankle bracelet.[96]

Many of the apprehensions described above were followed by detention. Some affected noncitizens were released from detention for humanitarian reasons; others were flown or transferred to detention facilities several miles from their homes and workplaces. For example, a fraction of workers arrested as part of the New Bedford raid were flown to a detention facility in Texas because of

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90. NAT'L COUNCIL OF LA RAZA, *supra* note 89, at 2.

91. Letter from NGOs to Julie Myers, Assistant Secretary, United States Immigration and Customs Enforcement (Nov. 6, 2007) (on file with author).

92. *Id.*

93. *Id.*

94. *Id.*

95. *Id.*

96. *See* Julia Preston, *Immigration Quandary: A Mother Torn from Her Baby*, N.Y. TIMES, Nov. 17, 2007, *available at* http://www.nytimes.com/2007/11/17/us/17citizen.html; Robert L. Smith, *Immigration Arrest Separates Mom from her Breast-fed Baby*, *available at* http://blog.cleveland.com/pdworld/2007/11/immigration_arrest_separates_m.html.

HeinOnline -- 38 U. Mem. L. Rev. 871 2007-2008

the lack of bedspace in Massachusetts.[97] The durations of detentions following a raid have varied widely, ranging from several hours to several weeks. According to Eunice Moscoso of the *Palm Beach Post*, at a March 2008 oversight hearing of the Department of Homeland Security:

> Rep. Melvin Watt, D-N.C., asked [DHS Secretary] Michael Chertoff to explain what it meant that U.S. Immigration and Customs Enforcement had power to "briefly detain" people and whether that included denying them food, water, access to their families and to union representation. Watt said this occurred at raids last year of Swift & Company meat packing plants. Chertoff said that "no specific amount of time" has been determined by the courts as far as detention periods, and pointed out that many of the people arrested had committed identity theft.[98]

Problems relating to both the use and conditions of immigration detention are not limited to ICE raids. The sheer number of individuals who pass through immigration detention is striking; according to ICE, during fiscal year 2007 "322,000 illegal aliens passed through ICE detention facilities and approximately 280,000 of those were removed from the United States."[99] Moreover, during fiscal year 2007, 30,295 noncitizens were detained by ICE on the average day.[100] In addition to the large number of noncitizens

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97. U.S. IMMIGRATION AND CUSTOMS ENFORCEMENT, TIMELINE FOR THE WORKSITE ENFORCEMENT OPERATION AT MICHAEL BIANCO, INC., Mar. 16, 2007, *available at* http://www.ice.gov/pi/news/factsheets/070316operationunitedfront.htm.

98. *Moscoso*, *supra* note 56.

99. Gary E. Mead, Deputy Director, Office of Detention and Removal Operations, United States Immigration and Customs Enforcement, Statement before the House Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, Feb. 13, 2008, *available at* http://www.ice.gov/doclib/pi/news/testimonies/garymead_testimony_ice_interrogation_detention_and_removal_procedures.pdf.

100. *See* ALISON SISKIN, CONGRESSIONAL RESEARCH SERVICE, IMMIGRATION-RELATED DETENTION: CURRENT LEGISLATIVE ISSUES, Jan. 30, 2008, *available at* http://www.shusterman.com/pdf/detention-crs108.pdf (Order Code RL32369).

HeinOnline -- 38 U. Mem. L. Rev. 872 2007-2008

held by the immigration agency in prison-like facilities, or in actual local jails contracted by ICE, are the arguably substandard conditions under which they are confined. Reports from the Government Accountability Office and the Office for the Inspector General echo concerns raised by NGOs and the American Bar Association for many years regarding the deficient conditions under which noncitizen are confined.[101]

A. Legal Authority[102]

The statute provides the Attorney General with authority to issue a warrant to arrest and detain any noncitizen pending removal from the United States.[103] An immigration officer may also make interrogations and arrests without a warrant.[104] Specifically, an immigration officer is authorized to "interrogate any alien or person believed to be an alien as to his right to be or to remain in the United States" and also may arrest, without a warrant, "... any alien in the United States, if he has reason to believe that the alien so arrested is in the United States in violation of any [immigration] law or regulation and is likely to escape before a warrant can be obtained for his arrest,"[105] The governing regulations also advise that "If the immigration officer has a reasonable suspicion, based on specific articulable facts, that the person being questioned is, or is attempting to be, engaged in an offense against the United States or is an alien illegally in the United States, the immigration officer may briefly detain the person for questioning."[106] Furthermore, the qualifying immigration officers vested with arrest authority are

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101. DEP'T OF HOMELAND SEC., OFFICE OF INSPECTOR GEN., TREATMENT OF IMMIGRANT DETAINEES HOUSE AT IMMIGRATION AND CUSTOMS ENFORCEMENT FACILITIES, Dec. 2006, *available at* www.dhs.gov/xoig/assets/mgmtrpts/OIG_07-01_Dec06.pdf; U.S. GOV'T ACCOUNTABILITY OFFICE, ALIEN DETENTION STANDARDS: TELEPHONE ACCESS PROBLEMS WERE PERVASIVE AT DETENTION FACILITIES; OTHER DEFICIENCIES DID NOT SHOW A PATTERN OF NONCOMPLIANCE, June 6, 2007, *available at* http://www.gao.gov/htext/d07875.html.

102. This article provides a snapshot of the legal authority governing alleged conduct or misconduct in the context of immigration "raids" and is by no means exhaustive.

103. INA § 236(a), 8 U.S.C. § 1226(a) (2006).

104. INA § 287(a), 8 U.S.C. § 1357(a)(2) (2006)

105. *Id.*

106. *See* 8 C.F.R. § 287.8(b) (2006).

HeinOnline -- 38 U. Mem. L. Rev. 873 2007-2008

listed in the regulations.[107] These statutory and regulatory powers are subject to constitutional restraints however.

Generally, once a noncitizen is arrested without a warrant, she must be "examined by an officer other than the arresting officer."[108] If a noncitizen is placed in formal removal proceedings, then the officer must advise her on "the reasons for his or her arrest and the right to be represented at no expense to the Government" and also provide a list of organizations and attorneys who provide free legal services.[109] The regulations also include a quasi-*Miranda* clause requiring that officers "advise the alien that any statement made may be used against him or her in a subsequent proceeding."[110]

According to immigration regulations, in most cases, an agent has forty-eight hours to make a charging and custody determination as well as the decision whether to issue the Notice to Appear ("NTA") "except in the event of an emergency or other extraordinary circumstance in which case a determination will be made within an additional reasonable period of time."[111] The forty-eight-hour rule was created in September 2001 by the DOJ, which failed to define "emergency," "extraordinary circumstance," or "additional reasonable period time."[112] Moreover, neither the regulations nor the statute contain a timeframe for serving a detained noncitizen or the Immigration Court with an NTA. Notably, the Supreme Court has previously held that the Constitution does not permit law enforcement to hold an arrestee for more than forty-eight hours without charge.

Both the absence of a legal standard for timely service of the NTA and the undefined "emergency" for holding noncitizens for longer than forty-eight hours without a charging or custody determination raise serious due process questions. Following a report issued by the DOJ's Inspector General in 2003 and several months of advocacy from NGOs about the loopholes contained in the forty-eight-hour regulation, Asa Hutchinson, the Undersecre-

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107. *See* 8 C.F.R. § 287.5(c) (2006).
108. 8 C.F.R. § 287.3(a)
109. 8 C.F.R. § 287,3(c) (2006).
110. *Id.*
111. 8 C.F.R. § 287(d) (2006).
112. *See generally id.*

HeinOnline -- 38 U. Mem. L. Rev. 874 2007-2008

tary of Border and Transportation Security at that time, issued a policy directive stating that during non-emergencies, detained non-citizens should be charged within forty-eight hours of their arrest and served with an NTA within seventy-two hours of such arrest.[113] The Hutchinson memo, however, contains a significant loophole by defining the term "emergency or other extraordinary circumstance" overbroadly.[114] For example, prolonged detention without charges or an NTA are permitted "[w]henever there is a compelling law enforcement need including, but not limited to, an immigration emergency resulting in the influx of large numbers of detained aliens that overwhelms agency resources and makes it unable to logistically meet the general servicing requirements."[115] Moreover, there is reason to believe that the Hutchinson memo is not being followed currently, even when the situation is non-emergent. This lack of enforcement is illustrated by the many detainees identified by NGOs and attorneys who are sitting in detention for days, weeks, and sometimes months at a time without having received an NTA. Take the example of Mr. T-T-, a lawful permanent resident who on February 12, 2007 was convicted of a theft crime and sentenced to twelve months incarceration with six months suspended.[116] Mr. T-T- came into ICE's custody on January 20, 2008.[117] More than one month after being placed into ICE custody, Mr. T-T- was processed by ICE, served with a Notice to Appear and placed in removal proceedings on March 8, 2008.[118] Mr. T-T- was detained without bond.[119] To sit inside a detention facility for more than one month without knowledge or notice about allegations by the government, the right to secure counsel or

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113. Memorandum from Asa Hutchinson, Undersecretary, Border and Transportation Security, to Michael J. Garcia, Assistant Secretary, U.S. Immigration and Customs Enforcement and Robert Bonner, Commissioner, U.S. Customs and Border Protection (Mar. 30, 2004), *available at* http://www.immigrationforum.org/documents/TheDebate/DueProcessPost911/ICEGuidance.pdf.

114. *Id.* at 3.

115. *Id.*

116. Client example provided by a local non-governmental organization by e-mail on April 12, 2008 (on file with the author).

117. *Id.*

118. *Id.*

119. *Id.*

HeinOnline -- 38 U. Mem. L. Rev. 875 2007-2008

a prospective court date is unlawful and counter to basic due process.

Another concern is that the Hutchinson memo does not provide a timeframe for when an NTA should be filed with the Immigration Court or the Executive Office for Immigration Review. Such a filing is crucial because it is the legal trigger for removal proceedings and, in many cases, the key vehicle through which a noncitizen is provided access to an immigration court and judge. Technically speaking, a detained noncitizen can file a request for bond even if the NTA has not been filed with the Immigration Court.[120] As a practical matter however, many detainees, in particular those without counsel, may be unaware of this technicality. Furthermore, a noncitizen with an outstanding order of removal may not be notified that she will be held in detention without bond until deportation is effectuated or the removal order is reopened before the immigration court.

The INA provides the statutory authority for detaining noncitizens. The law permits the Attorney General to detain arrested noncitizens pending a decision on their removal from the United States.[121] In most cases, individuals who arrive in the United States, either without documents or then with fraudulent documents, must be detained and removed expeditiously by an immigration officer.[122] Also, arriving asylum seekers must be detained pending a "credible fear" interview by an asylum officer.[123] Moreover, noncitizens deemed inadmissible or deportable for criminal or terrorist-related reasons, or those "suspected" of terrorism, are subject to "mandatory detention," barring such individuals from requesting release.[124] Notably, the Supreme Court has held that noncitizens subject to a removal order may not be detained indefinitely without an individualized bond determination, especially where removal is not reasonably foreseeable.[125] Individuals

120. 8 C.F.R. § 1003.14(a) (2006).

121. INA § 236(a), 8 U.S.C. § 1226(a) (2006).

122. INA § 235(b), 8 U.S.C. § 1225(b) (2006).

123. 8 C.F.R. § 235.3 (2006).

124. INA § 236(c), 8 U.S.C. § 1226(c) (2006); INA § 236A, 8 U.S.C. § 1226 (2006).

125. *See* Zadvydas v. Davis, 533 U.S. 678 (2001).; Beyond the scope of this article is the related topic of "alternatives to detention" programs. *See, e.g.*, Detention and Removal Operations: Alternatives to Detention,

HeinOnline -- 38 U. Mem. L. Rev. 876 2007-2008

who are not subject to mandatory detention may request a release on conditional parole,[126] a release on bond in an amount no less than $1,500,[127] or a release on their own recognizance. Immigration laws pertaining to detentions are extensive, yet the presence of data showing the monetary or policy gains from such detentions are lacking. In fact, anecdotal evidence shows that costs for detaining noncitizens can be up to $95 per person per day.[128]

In 2000, the Immigration and Naturalization Service (now "ICE") adopted a series of detention standards that it is required to follow with respect to immigrants in their custody.[129] The ICE detention standards were designed to provide minimum safeguards to ensure that immigrants were receiving fair and humane treatment.[130] Some of these standards include access to legal materials, telephone access, visitation procedures, medical care, and transfers between detention centers, among others.[131] Compliance with the ICE standards are uniquely important because unlike most people held in a detention facility, immigration detainees are not afforded the right to government-appointed counsel.[132] Advocates and the government's own ombudsmen, however, have long documented serious violations of the standards at facilities across the coun-

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http://www.ice.gov/pi/news/factsheets/061704detFS2.htm; Alternatives to Detention, http://www.cliniclegal.org/Advocacy/detentionalternatives.html.

126. INA § 236(a)(2), 8 U.S.C. § 1226(a)(2) (2006).

127. *Id.*

128. *See* Meredith Kolodner, *Immigration Enforcement Benefits Prison Firms*, July 19, 2006, *available at* http://www.nytimes.com/2006/07/19/ business/19detain.html?pagewanted=print; AM. BAR ASS'N COMM'N ON IMMIGRATION, REPORT TO THE HOUSE OF DELEGATES, Feb. 2006, *available at* http://www.abanet.org/publicserv/immigration/107e_detention.pdf; Detention Watch Network, About the U.S. Detention and Deportation System, http://www.detentionwatchnetwork.org/aboutdetention (last visited Apr. 4, 2008).

129. U.S. Immigration and Customs Enforcement, Detention Operations Manual, Sept. 20, 2000, *available at* http://www.ice.gov/partners/dro/opsmanual /index.htm.

130. *See generally id.*

131. *See generally id.*

132. *See generally id.*

HeinOnline -- 38 U. Mem. L. Rev. 877 2007-2008

try.[133] Asylum seekers are also protected under international standards and conventions preventing arbitrary or punitive detentions.

Safeguards under the United States Constitution also apply. The due process clause of the Fifth Amendment to the United States Constitution states "No person shall . . . be deprived of life, liberty, or property without due process of law."[134] The United States Supreme Court states, "[i]t is well established that the Fifth Amendment entitles aliens to due process of law in deportation proceedings."[135] "Once an alien enters the country, the legal circumstances change, for the Due Process Clause applies to all 'persons' within the United States, including aliens, whether their presence here is lawful, unlawful, temporary, or permanent."[136] Moreover, government conduct that "shocks the conscience" violates the Fifth Amendment guarantee against deprivation of "life, liberty, or property, without due process of law."[137] The Fourth Amendment to the United States Constitution states "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated . . . ."[138] These standards have been utilized by litigants and Courts to analyze potential Constitutional violations.

B. Accountability and Oversight

Modest oversight of ICE raids and detentions is occurring. For example, the Department of Homeland Security's Inspector General is conducting an investigation into the New Bedford Raids.[139] Similarly, the House Judiciary Committee's Subcommittee on Immigration held an oversight hearing in February 2008 entitled "Hearing Problems with ICE Interrogation, Detention and Removal Procedures," during which Michael Graves, a member of the United Food and Commercial Workers International Union and

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133. *See, e.g.*, DEP'T OF HOMELAND SEC., *supra* note 103; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 103.

134. U.S. CONST. amend. V.

135. Reno v. Flores, 507 U.S. 292, 306 (1993).

136. Zadvydas v. Davis, 533 U.S. 678, 693 (2001).

137. *See* Rochin v. California, 342 U.S. 165, 172–73 (1952).

138. U.S. CONST. amend. IV.

139. John C. Drake, *U.S. Agency Is Probing Raid on Factory*, BOSTON GLOBE, Jan. 19, 2008, *available at* http://www.boston.com/news/local/articles/2008/01/19/us_agency_is_probing_raid_on_factory/.

HeinOnline -- 38 U. Mem. L. Rev. 878 2007-2008

a twenty-one-year employee of the Swift & Company plant in Marshalltown, Iowa, spoke about the raids at his workplace.[140] Mr. Graves testified that an agent held him against a wall, handcuffed him and began interrogating him about his birthplace and residence.[141] Furthermore, Mr. Graves testified that he told ICE that he was a U.S. citizen, but ICE persisted with questions about the geographic distances between his home, the workplace, and his parents' house.[142] Mr. Graves recounted:

> I was working on the kill floor doing my usual job when the line was stopped and my supervisor told me and my coworkers to go immediately to the cafeteria. As we walked to the cafeteria, using the regular route, a man in full SWAT uniform with a gun stopped us. His uniform had no nametag to identify him as a government agent. . . . [he] told me to get against the wall and he handcuffed me. He then began to interrogate me about where I was born, where I now lived, where my parents live, and whether I was a U.S. citizen. I told him I was born in Waterloo, Iowa, and that was where I still live. I answered each question honestly and politely although I was uncomfortable in the handcuffs and not sure why I was being interrogated in this way. . . . I am a father of U.S. citizens. I live in the same state in which I was born. I have worked in the Swift plant for more than two decades. It is not easy work, so with all due respect to the Subcommittee, I found his questioning insulting and offensive. And, quite frankly, regardless of my status, his interrogation, the handcuffs, the guns, and the agents in SWAT uniforms were all incredibly unnecessary and intimidating—and I had done nothing

140. Michael Graves, Member of the United Food and Commercial Workers International Union (UFCW) Local 1149, Testimony before the Subcommittee on Immigration, Citizenship, Refugees, Border Security, and International Law, Feb. 13, 2008, *available at* http://judiciary.house.gov/OversightTestimony.aspx?ID=1278.

141. *Id.*

142. *Id.*

HeinOnline -- 38 U. Mem. L. Rev. 879 2007-2008

> wrong. . . . The agents finally removed the cuffs and I was forced to sit down in the cafeteria for the next seven hours with hundreds of my coworkers. We had no food and no water. We weren't allowed to use the restrooms by ourselves. We couldn't use the phone to contact our families, union representatives or lawyers. . . . No one in this country, regardless of their status, should be treated the way we were treated at the Marshalltown Swift plant or any of the Swift plants. Working is not a crime.[143]

In December 2006, the Department of Homeland Security's Inspector General issued a report on five detention centers holding immigrants and found "instances of non-compliance" with the Department's standards regarding medical care, general conditions of confinement, and reporting of abuses, among others.[144] Similarly, in response to a flurry of press reports on medical maltreatment and deaths of noncitizens while in ICE custody, the same House Subcommittee on Immigration held a related oversight hearing in early October 2007. As expressed by one surviving patient-detainee at the hearing:

> I had to be here today because I am not the only one who didn't get medical care I needed. It was routine for detainees to have to wait weeks or months to get even basic care. Who knows how many tragic endings can be avoided if ICE will only remember that, regardless of why a person is in detention and regardless of where they will end up, they are still human and deserve basic, humane medical care.[145]

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143. *Id.*

144. *See, e.g.*, DEP'T OF HOMELAND SEC., *supra* note 103; U.S. GOV'T ACCOUNTABILITY OFFICE, *supra* note 103.

145. Francisco Castaneda, Testimony before the Subcommittee on Immigration, Citizenship, Refugees, Border Security and International Law, Oct. 4, 2007, *available at* http://judiciary.house.gov/media/pdfs/Castaneda071004.pdf.

HeinOnline -- 38 U. Mem. L. Rev. 880 2007-2008

Mr. Castaneda died on February 16, 2008 in his Los Angeles home.[146]

Likewise, ICE developed humanitarian-driven protocol for immigration officers to follow when conducting enforcement actions. In November 2007, ICE released memoranda regarding the standards officers should follow when "enforcing" the immigration laws against individuals.[147] In response to the fallout from the raids in New Bedford, Massachusetts, ICE issued guidelines for assessing humanitarian needs during large-scale worksite raids, including the identification of sole caregivers, those with serious medical conditions requiring special attention, pregnant women, nursing mothers, and others.[148] The guidelines instruct:

> ICE should coordinate with the Department of Health and Human Services, Division of Immigration Health Services (DIHS), to provide a sufficient number of personnel to assess the humanitarian needs of arrestees at the ICE processing site. . . . In the event DIHS is unable to provide the requested support, ICE should provide advance notice of a planned worksite enforcement operation to the SSSA in the appropriate jurisdiction.[149]

While these guidelines evidence a positive step forward by ICE to instill basic discretion into the apprehension and detention stage of a raid, it falls short in a number of areas. For example, while the guidance contains a narrow possibility for humanitarian screening during a small worksite action involving less than 150 individuals, the central focus of the guidance is on large worksite operations.[150] Similarly, the guidelines provide an opportunity for

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146. *See Immigrant Who Sued Federal Government over Treatment Dies at 36*, SAN FRANCISCO CHRON., Feb. 24, 2008, *available at* http://federal-government-news.newslib.com/story/37-3244731/.

147. Press Release, Kennedy, Delahunt Announce New Guidelines for Immigration Raids (Nov. 16, 2007), *available at* http://kennedy.senate.gov/newsroom/press_release.cfm?id=0f91969e-96eb-4ab1-832b-2cf42451b587.

148. *Id.*

149. *Id.*

150. *See generally id.*

HeinOnline -- 38 U. Mem. L. Rev. 881 2007-2008

NGOs to engage in the humanitarian screening process only in the event that DIHS is unable to handle such screening itself.[151] This seems insufficient. DHS should consider allowing any willing NGO or social service agency, with a track record of assisting noncitizens, to assist with humanitarian screening as a regular practice. Finally, the guidelines do not provide a process for humanitarian screening during ICE enforcement actions beyond the workplace, such as at a home, on the street, or during enforcement actions executed under the "Fugitive Operation Program."[152] A related criticism described in a complaint filed with a federal district court "[ICE] has failed to develop meaningful guidelines or oversight mechanisms to ensure that home arrests are conducted within constitutional limits, to provide the agents involved with adequate training (or for some newer agents any training) on the lawful execution of fugitive operations, or otherwise ensured accountability for the failure to conduct fugitive operations within constitutional limits."[153]

In November 2007, ICE also issued guidelines instructing officers in the treatment of "nursing mothers" during the course of an enforcement action, in response to the above-mentioned action involving a nursing mother of three from Cleveland, Ohio.[154] The directive states, in part: "Absent any statutory detention requirement or concerns such as national security or other investigative interests, the nursing mother should be released on an Order of Recognizance or Order of Supervision and the Alternatives to Detention programs should be considered as an additional enforcement tool."[155]

Members of Congress have also introduced related legislation. In fall 2007, Senator John Kerry (D-MA) and Representative Hilda Solis (D-CA) introduced legislation known as the "Families

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151. *See generally id.*

152. *See generally id.*

153. *See* Immigration Home Raids in New Jersey, *supra* note 80.

154. Memorandum from Julie L. Myers, Assistant Secretary, U.S. Immigration and Customs Enforcement, to Field Office Directors and Special Agents in Charge (Nov. 7, 2007), *available at* http://bibdaily.com (in the Archive/Search section, type "Myers" in the Keywords box, select "Titles," enter the date Nov. 7, 2007, click on the Search button, and select "New ICE Myers Memo on Prosecutorial Discretion" from the search results).

155. *Id.*

HeinOnline -- 38 U. Mem. L. Rev. 882 2007-2008

First Immigration Enforcement Act" to codify particular safeguards and conditions for release from detention during the course of a raid.[156] Aimed at workplace enforcement actions involving fifty or more noncitizens, the legislation requires DHS to provide state social agencies with advance notice of a worksite operation as well as access to individuals detained as a result of such operation for screening purposes.[157] The bill requires non-dangerous individuals with strong equities to be released from detention through bond or placement into an "alternatives" to detention program.[158] Moreover, the bill requires DHS to consider recommendations by the state social agency and the Division of Immigration Health Services regarding which detainees should be released on humanitarian grounds, specifying, for example, those with a medical attention, pregnant women, nursing mothers, sole caregivers, and those who are eighteen years of age and younger, among others.[159] The bill also mandates DHS to provide a toll-free number for families of detainees through both English and ethnic media.[160] It codifies that every noncitizen targeted by a raid involving fifty or more noncitizens shall have access to legal orientation presentations provided by independent, nongovernmental agencies through the Legal Orientation Program administered by the Executive Office for Immigration Review.[161]

In the courts, legal actions have also been made against the government alleging misconduct and abridgement of rights during a raid. On April 3, 2008, the Seton Hall Law School's Center for Social Justice and Lowenstein Sandler, PC, filed a complaint in the federal district court for the district of New Jersey based on eight home raids under ICE's "fugitive operations program."[162] According to the complaint "Plaintiffs in this case are all victims of these unconstitutional home raid practices. They include United States citizens and lawful residents. Each plaintiff was present in his or her home in the pre-dawn hours of the morning, when a team of

156. *See* Families First Immigration Enforcement Act, S. 2074, H.R. 2074, 110th Cong. (2007).

157. *See id.* at § 3.

158. *See id.* at § 4.

159. *See id.* at § 3(f).

160. *Id.* at § 3(g).

161. *Id.* at § 5.

162. *See* Immigration Home Raids in New Jersey, *supra* note 80.

HeinOnline -- 38 U. Mem. L. Rev. 883 2007-2008

federal agents gained unlawful entry, through deceit or, in some cases, raw force. Agents swept throughout the homes, ordered sleeping people – including, in some cases, children – out of bed, and detained the occupants without judicial warrant or other legal justification." The plaintiff's summary includes the following story of Arturo Flores and Bybyana Arias:

> At around 3:00 a.m. on November 13, 2006, ICE agents pounded loudly on the door of the Clifton home of Arturo and his teenage step-daughter Bybyana, both U.S. citizens. Without a warrant, the agents forced their way through the front door past Arturo, and searched his entire home. Displaying guns, the armed ICE agents ordered Bybyana and the other occupants out of their beds and forced them to gather in their nightclothes in a common area, where the agents detained and interrogated them. The agents demanded that Arturo, a U.S. citizen, present identification. In front of Bybyana, the agents handcuffed her mother and led her away without allowing Bybyana to say goodbye. Bybyana, a teenaged college student at the time, was seriously traumatized by the raid.[163]

According to Seton Hall attorney Bassina Farbenblum, "Our complaint shows that what happened to our plaintiffs in the middle of the night was not exceptional. It was part of a routine, widespread practice, condoned at the highest levels of government, that tramples the rights of citizens and non-citizens alike."[164] In another case pertaining to the raids of New Bedford, Senior Judge Bruce M. Selya of the First Circuit Court of Appeals remarked:

> We are sensitive to the concerns raised by the petitioners and are conscious that undocumented workers, like all persons who are on American soil, have

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163. *See* Immigration Home Raids in New Jersey, http://law.shu.edu/csj/iceraids.html (last visited Apr. 4, 2008).

164. Press Release, Department of Homeland Security, Immigration Officers Sued for Constitutional Violations in Pre-Dawn Home Raids Practice, Apr. 3, 2008, *available at* http://biz.yahoo.com/prnews/080403/nyth091.html?.v=101.

HeinOnline -- 38 U. Mem. L. Rev. 884 2007-2008

> certain inalienable rights. But in the first instance, it is Congress—not the judiciary—that has the responsibility of prescribing a framework for the vindication of those rights. . . . we express our hope that ICE, though it has prevailed [in the present case], nonetheless will treat this chiaroscuro series of events as a learning experience in order to devise better, less ham-handed ways of carrying out its important responsibilities.[165]

In February 2008, a group of lawyers from the National Lawyers Guild filed a complaint with the United States District Court for the Central District of California, arguing that ICE officials, following a raid in Van Nuys, California, deprived the plaintiff of his right to counsel under the Administration Procedures Act, the immigration laws, and the Fifth Amendment of the Due Process Clause under the U.S. Constitution.[166] Specifically, the complaint alleges that DHS prevented attorneys from being present at scheduled interviews with arrested noncitizens.[167] Similarly, a number of lawsuits were brought against the U.S. government in connection with an ICE raid at Swift and Co., alleging, among other things, violations under the immigration statute and Fifth Amendment of the U.S. Constitution.[168] The federal court litigation surrounding ICE raids is striking. Legal action has also been brought to challenge conditions of confinement.[169]

Notably, the United Food and Commercial Workers Union ("UFCW") also named a National Commission to conduct private

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165. Aguilar v. U.S. Immigration and Customs Enforcement, 510 F.3d 1, 24 (1st Cir. 2007).

166. *See* Complaint, Nat'l Lawyers Guild v. Chertoff, No. 08-01000 (C.D. Cal. Feb. 14, 2008), *available at* http://www.ailf.org/lac/chdocs/NLGcomplaint.pdf.

167. *Id.* at 3.

168. *See* American Immigration Law Foundation: Litigation Relating to ICE Raids, http://www.ailf.org/lac/clearinghouse_122106_ICE.shtml (last visited Apr. 4, 2008).

169. *See, e.g.*, *In re* Hutto Family Detention Center, No. 07-164 (W.D. Tex. 2007); Press Release, ACLU Challenges Illegal Detention of Immigrant Children Held in Prison-Like Conditions, Mar. 6, 2007, *available at* http://www.aclu.org/immigrants/detention/28865prs20070306.html.

HeinOnline -- 38 U. Mem. L. Rev. 885 2007-2008

hearings relating to immigration "raids."[170] The National Commission was created in September 2007 with a mission of "exposing injustice witnessed during the ICE raids, educating the public, and making clear recommendations as to how the government should treat its citizenry."[171] The hearings themselves will examine ICE's violations of the Fourth Amendment and thereafter will issue a public report to include its findings and related recommendations.[172] The UFCW makes a striking comparison between the National Commission and the civilian initiated commissions created in the late 1960s in response to the abuses against African-Americans.[173]

Media reports have also served as an oversight mechanism for ICE raids and detentions. To mark the one-year anniversary of the raids in New Bedford, Massachusetts, *The New York Times* reported:

> Exactly one year ago today, immigration officials rounded up 361 people, many of them from Central America, during a raid of a Michael Bianco leather-goods factory in New Bedford, Mass. It was an event that quickly became a hot-button issue for immigrant-rights advocates, and, for immigration officials, a public-relations disaster. Families were separated, single mothers were taken off to jail, and at least one infant who was accustomed to nursing from his mother had to be taken to a hospital while the mother was being detained.[174]

Similarly, *The Boston Globe* stated:

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170. *See also* Commission hears ICE raid complaints, Apr. 8, 2008, *available at* http://www.upi.com/Top_News/2008/04/08/Commission_hears_ICE_raid_complaints/UPI-73101207702855/; *See generally* National Commission on ICE Misconduct and Violations of 4th Amendment Rights: About the Commission, http://www.icemisconduct.org/icemisconduct/about_the_commission/index.cfm [hereinafter National Commission] (last visited Apr. 4, 2008).

171. *See* National Commission, *supra* note 173.

172. *See id.*

173. *See id.*

174. Anahad O'Connor, *Immigration Agency Learns from '07 Raid*, Mar. 6, 2008, http://thelede.blogs.nytimes.com/2008/03/06/a-year-later-debate-continues-about-raid/?hp.

HeinOnline -- 38 U. Mem. L. Rev. 886 2007-2008

> [The New Bedford] raid quickly became a flashpoint in the national debate over illegal immigration, and the federal immigration agency faced criticism for its handling of the detainees. State officials slammed the agency's decision to swiftly send a huge group of immigrants, including parents, to detention centers in Texas. . . . Myers again defended the agency's tactics. She said no children were stranded without a caregiver, and she acknowledged that the agency has since adopted guidelines designed to ensure that children have proper care and that detainees have access to healthcare, lawyers, and other services. . . . She pointed out that the raid led to successful indictments of the factory's owner and managers, a deterrent to other employers who might consider hiring undocumented immigrants.[175]

Senator Kerry (D-MA) released a related editorial, noting:

> So one year later, was it a wake-up call? Has the Bureau of Immigration and Customs Enforcement—the agency that conducted the Bianco raid—learned from their mistakes? Unfortunately, not nearly enough: [j]ust last month, ICE raided a printer supply company in Van Nuys, California and allegedly repeated many of the same mistakes: denying detainees access to families and attorneys, as well as mass handcuffing of people who posed no threat. Most shockingly, given the lessons of New Bedford, workers who attempted to call family

175. Maria Sacchetti, *A Year After Raid, Immigration Cases Drag on for Many*, BOSTON GLOBE, Mar. 6, 2008, at B1, *available at* http://www.boston.com/news/local/articles/2008/03/06/a_year_after_raid_immigration_cases_drag_on_for_many?mode=PF.

HeinOnline -- 38 U. Mem. L. Rev. 887 2007-2008

> members and arrange for child care claim that agents prevented them from doing so.[176]

IV. RECOMMENDATIONS FOR MOVING FORWARD

Modest efforts by ICE to inject humanity into its arrest, detention, and removal procedures, and the occasional reporting and oversight over DHS's activities will not solve the problems of the U.S. immigration system. Robust oversight and accountability by Congress and the Department of Homeland Security's own regulators remains critical. Likewise, alleviating some of the extreme forms of enforcement through administrative advocacy and consultation with the various federal agencies responsible for immigration can prove useful and result in modest directives and policies that respect basic rights and ensure that immigrants receive a fair process. For example, ICE could improve its protocol for enforcement actions by applying its humanitarian protocol to all operations, worksite, and beyond by: (1) requiring ICE officials to assist arrested noncitizens with finding counsel; (2) prohibiting ICE from transferring detained noncitizens to faraway locations; (3) refraining from entering homes, churches, and schools where children are located; and (4) requiring ICE officials to treat individuals encountered during an operation with dignity and respect. Moreover, ICE should train its officers and partnering agents on the humanitarian guidelines and existing policy memoranda relating to prosecutorial discretion.

Advancing bolder administrative and legislative reforms to redress extremities emanating from the 1996 immigration laws, post-9/11 panic, and post-CIR climate of raids and detention is also important. Some of the reforms include:

> *Issue an Emergency Stay of Removal for Noncitizens Arrested or Detained by ICE Raids*:
>
> The government must create a protective measure for noncitizens targeted by ICE during an enforcement action who are otherwise contrib-

176. Senator John Kerry, Immigration Enforcers Fail to Police Themselves, Mar. 6, 2008, *available at* http://www.southcoasttoday.com/apps/pbcs.dll/article?AID=/20080306/OPINION/803060320.

HeinOnline -- 38 U. Mem. L. Rev. 888 2007-2008

> uting to the United States or based on positive equities, such as family ties in the United States, employment in the United States, fear of harm or egregious conditions in one's home country, or potential eligibility for an immigration benefit or relief from removal. Arguably, the government is already required to consider these standards through the enforcement process, including whether to arrest, charge, detain or remove a noncitizen.

Codify the National Detention Standards and Improve Certain Others; Expand "Alternatives" to Detention:

> The government must create detention standards that are legally enforceable in function and explicitly meaningful in content.

Create a Regulation to Ensure Court-Appointed Counsel:

> The government should adopt regulations that enable indigent and detained noncitizens to obtain court-appointed counsel. Such regulations should have a built-in requirement that every noncitizen be notified about his right to court-appointed counsel if he is indigent or detained. This protection should apply to noncitizens at the border and the interior of the United States.

Restore Proportionality into the Immigration System:

> The government must revisit and update the current penalty schemes that exist in the immigration statute and regulations. For example, making a person's failure to file a change of address card within ten days a crime, reason for detention and ground for removal is arguably disproportionate. Similarly, the aggravated fel-

HeinOnline -- 38 U. Mem. L. Rev. 889 2007-2008

ony definition should be limited to crimes that are truly felonious and violent.

Terminate Selective Enforcement Programs Driven by Country of Origin and Religion:

The government must repeal the regulations relating to the "special registration" and exercise discretion favorably towards individuals who are impacted by the program. The government must refrain from using data collected through the "special registration" program for law enforcement purposes. The government must prohibit tracking schemes driven solely by national origin, religion, gender, race and/or nationality in the future.

Ensure that Detained Noncitizens Receive Adequate and Timely Notice and Access to a Court:

The government must codify a timeframe during which immigration officers are required to charge and serve a Notice to Appear on detainees and the Immigration Court. If the government fails to provide timely charges and service of notice on the detainees, such detainees must be placed before an immigration judge to determine if continued detention without due process is justified.

Restore Discretion for Officers and Judges to Consider Individual Factors:

The government must restore the ability for officers and judges to defer, stay, or waive removal based on the individual circumstances and equities of a noncitizen.

Expand Oversight and Accountability by Congress and Mechanisms within the Executive Branch:

HeinOnline -- 38 U. Mem. L. Rev. 890 2007-2008

> The government must centralize the immigration functions within the Department of Homeland Security and appoint a senior leader to coordinate and manage immigration services and enforcement. The government must bolster the authority and capacity of the Inspector General, civil rights officers and ombudsmen in the Executive Branch to expose and investigate misconduct and abuse by its officers as well as process and resolve complaints alleging related abuse.

V. CONCLUSION

The recommended changes described above appeal particularly to advocates of fair process and basic rights. Those who do not care much about the "rights" part of the equation, however, cannot escape the reality that it would be difficult to gain control of the U.S. immigration system through sweeps, jails and deportations alone. Eventually, Congress can and must enact comprehensive immigration reform. In the meantime, we must plough through an era of severe enforcement and deportation measures aimed at noncitizens and their families. However hostile the climate, the policymakers inside the Beltway, communities on the ground, lawyers in the courts, and academics and students have critical roles to play. We can demand no less of ourselves. As Gandhi reminds us, "You must be the change you want to see in the world."

HeinOnline -- 38 U. Mem. L. Rev. 891 2007-2008

HeinOnline -- 38 U. Mem. L. Rev. 892 2007-2008